



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 6, 1993

Mr. William O. Goodman
Assistant Attorney General
Assistant Chief for Litigation
Consumer Protection Division
P. O. Box 12548
Austin, Texas 78711-2548

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OR93-505

Dear Mr. Goodman:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 17131.

In July 1992 you received a request for information relating to the Office of the Attorney General's closed investigation of Psychiatric Institutes of America ("PIA"). You subsequently requested a determination regarding some of the requested information pursuant to section 7 of the Open Records Act. That information encompassed 24 categories. In two open records letters, Open Records Letters OR92-431 and OR92-603 (copies enclosed), we addressed the availability of most of the requested information under the Open Records Act. We withheld a determination, however, with respect to category 23, which we now address.

You have submitted to us for review two documents representing internal documentation of PIA that you received as part of your investigation into and lawsuit against that company. The first document is titled "Step by Step Guide to Seasonal Variance Plans." The second document is titled "Intake--Administrator Driven Intake Systems." You ask whether these documents are excepted from required public disclosure by section 3(a)(10) of the Open Records Act.

Pursuant to section 7(c) of the act, attorneys for PIA have submitted to us arguments in support of their assertion that category 23 is excepted from required public

disclosure by section 3(a)(10).¹ Section 3(a)(10) protects the property interests of private persons by excepting from required public disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. PIA claims that the two documents submitted to us for review constitute "trade secrets" or confidential "commercial or financial information."

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business, . . . [but] a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

Restatement of Torts § 757, cmt. b (1939). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 3(a)(10) to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5-6.²

¹In your letter of January 28, 1993, you also claim that category 23 is excepted from required public disclosure by section 3(a)(4) of the Open Records Act, which excepts "information which, if released, would give advantage to competitors or bidders." The purpose of section 3(a)(4) is to protect governmental interests in commercial transactions. Open Records Decision No. 541 (1990). Neither you nor PIA indicate why the requested information may be withheld under section 3(a)(4) at this time. Accordingly, category 23 may not be withheld under section 3(a)(4).

²The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are

We have examined the documents submitted to us for review and have considered PIA's arguments in support of its contention that this information constitutes "trade secrets" within the meaning of section 3(a)(10) of the Open Records Act. PIA's arguments generally restate the Restatement criteria in a conclusory manner without providing sufficient facts that independently support a *prima facie* case that the information constitutes "trade secrets." Accordingly, we conclude that PIA has not established a *prima facie* case that it constitutes "trade secrets." *See also* Open Records Decision No. 554 (1990).

Additionally, PIA has not established that the information merits protection as commercial or financial information under the second prong of section 3(a)(10). In Open Records Decision No. 592 (1991), this office held that "to be excepted from required public disclosure under section 3(a)(10) of the Open Records Act, 'commercial or financial information obtained from a person' must be 'privileged or confidential' under the common or statutory law of Texas." *Id.* at 9 (citing the summary). PIA has failed to identify any state or federal statute or regulation that makes the information confidential.³ Furthermore, we are unaware of any federal or Texas statutes that make confidential any of the information submitted to us for review. We thus have no basis to conclude that the two documents submitted to us for review are excepted from required public disclosure under section 3(a)(10) of the Open Records Act. Accordingly, the two documents must be released in their entirety.

the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Restatement of Torts § 757, cmt. b (1939); *see also* Open Records Decision Nos. 319, 306 (1982); 255 (1980). When an agency or company fails to provide relevant information regarding factors necessary to make a 3(a)(10) claim, there is no basis to withhold the information under section 3(a)(10). *See* Open Records Decision No. 402 (1983).

³PIA claims that discovery privileges except the information submitted to us for review from required public disclosure under the Open Records Act. Discovery privileges are incorporated into the Open Records Act under section 3(a)(3), the "litigation exception." *See* Open Records Decision No. 575 (1990). Section 3(a)(3) is designed to protect the litigation interests of governmental bodies, not private third parties. *See generally* Open Records Decision No. 392 (1983). Accordingly, in this instance, the information submitted to us for review may not be withheld from required public disclosure in conjunction with discovery privileges.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Celeste A. Baker
Assistant Attorney General
Open Government Section

CAB/GCK/jmn

Ref.: ID# 16761
ID# 16762
ID# 17131

Enclosures: Open Records Letter No. 92-431
Open Records Letter No. 92-603

cc: Mr. Adam R. Hardison
Law Offices of James C. Barber
4310 Gaston Avenue
Dallas, Texas 75246

Mr. Barry F. McNeil
Ms. Stacy L. Brainin
Haynes & Boone, L.L.P.
3100 NCNB Plaza
901 Main Street
Dallas, Texas 75202-3714